

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WILD GAMING NG, LLC,

Plaintiff,

v.

WONG INTERNATIONAL (USA)  
CORPORATION,

Defendant.

03:05-CV-00635-LRH-RAM

ORDER

Presently before the court is Wong International (USA) Corporation's ("Defendant") Motion to Dismiss or, in the Alternative, Motion for a more Definite Statement (# 2<sup>1</sup>). Wild Gaming NG, LLC ("Plaintiff") has filed an opposition (# 11), and Defendant replied (# 12).

**I. Factual Background**

This is an action for damages arising out of an allegedly defective gaming device that was manufactured by Defendant. In 2001, the parties entered into a contract for the sale and purchase of gaming equipment including software, slot machines, and gaming parts. The gaming equipment uses a CVT that communicates information, including "payouts and comps," between computers and gaming devices. The CVT contains "boards" that were manufactured by Defendant. The

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<sup>1</sup>Refers to the court's docket number.

1 “boards” are allegedly defective due to the use of excessive adhesive. Plaintiff alleges that  
2 Defendant concealed the defects in the CVT. As a result, Plaintiff is seeking “damages for lost  
3 profits and payment of excessive comps.”

## 4 **II. Legal Standard**

5 In considering “a motion to dismiss, all well-pleaded allegations of material fact are taken  
6 as true and construed in a light most favorable to the non-moving party.” *Wylar Summit P’Ship v.*  
7 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court  
8 does not necessarily assume the truth of legal conclusions merely because they are cast in the form  
9 of factual allegations in plaintiff’s complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752,  
10 754-55 (9th Cir. 1994).

11 There is a strong presumption against dismissing an action for failure to state a claim. *See*  
12 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). “The issue is  
13 not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in  
14 support of the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled on other grounds*  
15 *by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Consequently, the court should not grant a  
16 motion to dismiss “for failure to state a claim unless it appears beyond doubt that the plaintiff can  
17 prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*,  
18 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

## 19 **III. Discussion**

20 As a result of the events discussed above, Plaintiff filed this action alleging causes of action  
21 for breach of contract, negligence, fraudulent misrepresentation, negligent misrepresentation, and  
22 strict liability. Defendant is currently seeking to dismiss Plaintiff’s claims for negligence, negligent  
23 misrepresentation and strict liability on the basis of the economic loss doctrine. Specifically,  
24 Defendant argues that “Plaintiff has not plead that *property* other than the allegedly defective ‘CVT  
25 equipment with defective boards’ was injured or damaged.” (Def.’s Mot. to Dismiss (# 2) at 4.) In  
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1 addition, Defendants argue that Plaintiff's claim for fraudulent misrepresentation should be  
 2 dismissed because it was not pled with particularity. In opposition to the motion, Plaintiff argues  
 3 that the economic loss doctrine does not apply because it has alleged property damage separate  
 4 from defective device. Plaintiff also states that the complaint properly alleges a claim for  
 5 fraudulent misrepresentation.

#### 6 **A. Economic Loss Doctrine**

7 “The economic loss doctrine marks the fundamental boundary between contract law, which  
 8 is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of  
 9 reasonable care and thereby encourages citizens to avoid causing physical harm to others.”  
 10 *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000) (quoting Sidney R. Barrett, Jr.,  
 11 *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L.Rev.  
 12 891, 894 (1989)). Central to the doctrine is the “premise that economic interests are protected, if at  
 13 all, by contract principles, rather than tort principles.” *Id.* at 1265. Generally, “the economic loss  
 14 doctrine prohibits recovery in tort for purely economic losses.” *Id.* at 1263. Purely economic loss  
 15 is defined as “the loss of the benefit of the user's bargain . . . including . . . pecuniary damage for  
 16 inadequate value, the cost of repair and replacement of the defective product, or consequent loss of  
 17 profits, without any claim of personal injury or damage to other property.” *Id.* at 1263 (quoting  
 18 *American Law of Products Liability* § 60:39, at 66 (3d ed. 1991)). The economic loss doctrine  
 19 “shield[s] a defendant from unlimited liability for all of the economic consequences of a negligent  
 20 act, particularly in a commercial or professional setting, and thus . . . keep[s] the risk of liability  
 21 reasonably calculable.” *Id.* at 1266 (quoting *Local Joint Executive Bd. v. Stern*, 651 P.2d 637, 638  
 22 (Nev. 1982)). It also encourages the parties to negotiate economic risks through contractual  
 23 provisions and price terms prior to contract formation, thus avoiding the cost burden on the public  
 24 that results from the imposition of a tort duty. *Florida Power & Light Co. v. Westinghouse Elec.*  
 25 *Corp.*, 510 So. 2d 899, 901-02 (Fla. 1987). Although the doctrine arose in the area of products  
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1 liability, it has since gained broader application and serves to maintain the distinction between  
2 contract and tort principles. *Calloway*, 993 P.2d at 1265.

3        Construing the allegations in the complaint in a light most favorable to the Plaintiff, the  
4 court finds that Plaintiff's claims for negligence and strict liability are barred by the economic loss  
5 doctrine. In this action, Plaintiff is seeking "damages for lost profits and payment of excessive  
6 comps." (Compl. ¶ 12.) These damages resulted from "CVT equipment with defective boards  
7 which caused win and loss to be miscalculated." *See Id.* ¶ 20. Plaintiff's consequent losses and  
8 inability to maximize profits from the operation of its business are purely economic losses. *See*  
9 *Calloway*, 993 P.2d at 1263.

10        In *Arco Prods. Co. v. May*, May, an ARCO franchisee, brought a negligence and products  
11 liability action against the franchiser. 948 P.2d 263 (Nev. 1997). The action followed ARCO's  
12 installation of a new cash register system in May's franchise. *Id.* at 1296. After using the system  
13 for several months, "May notified ARCO that he had been experiencing inventory shortages and  
14 that he believed the shortages were caused by the new cash register system" *Id.* The damages  
15 alleged in that action included "lost profits caused by the . . . cash register's failure to tally scanned  
16 items, additional royalties paid to ARCO due to inventory variations, the cost of training employees  
17 to use the . . . cash registers, and the difference in rental cost between the . . . system and the cash  
18 registers previously used." *Id.* at 1298. The Nevada Supreme Court, however, found that May  
19 could not bring a negligence action because these asserted damages were purely economic. *Id.* In  
20 reaching that conclusion, the Nevada Supreme Court reasoned that May's employees allowed the  
21 inventory items to be taken from the premises by customers in exchange for financial consideration.  
22 *Id.* Therefore, May's grievance was not that the items were taken, but rather that his employees  
23 failed to collect full payment for the transactions. *Id.*

24        The case at bar is analogous to *Arco Prods. Co.* Here, all the asserted damages arose out of  
25 the allegedly malfunctioning CVT. Plaintiff is not asserting damages based on the fact that  
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1 payments were made (wins, losses, and comps). Instead, Plaintiff is asserting damages based on  
2 the improper calculation of those payments. Furthermore, the Complaint, contrary to Plaintiff's  
3 assertions, does not contain any allegation that any property other than the defective system was  
4 damaged. All damages alleged in the complaint are economic losses protected by principles of  
5 contract law. Therefore, Plaintiff's claims for negligence and strict liability will be dismissed.

6 The court further finds, however, that Plaintiff's claim for negligent misrepresentation is not  
7 barred by the economic loss doctrine. Plaintiff's fourth cause of action alleges that Defendant  
8 made false statements in order to induce Plaintiff to enter into the contract at issue in this case.  
9 Specifically, Plaintiff alleges that it was told that the "CVT's were tested for defects and  
10 determined not to be defective." (Compl. ¶ 37.) Plaintiff further alleges that Defendant failed to  
11 disclose the defects after it learned that the CVTs were defective. *Id.*

12 In *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, a case involving a car  
13 dealership financing agreement, this court held that the "economic loss doctrine does not bar tort  
14 claims that are based on a duty independent of those imposed by the contract." 359 F.Supp.2d  
15 1075, 1083 (D. Nev. 2004). "The tort of fraudulent inducement is the most salient example of an  
16 independent tort that is not barred by the economic loss doctrine." *Id.* The court reasoned that  
17 fraud claims occurring prior to the formation of a contract are excluded from the economic loss  
18 doctrine because one party's ability to negotiate and make an informed decision is undermined by  
19 the other party's fraudulent behavior. *Id.* (citing *Huron Tool & Eng'g Co. v. Precision Consulting*  
20 *Servs., Inc.*, 532 N.W.2d 541, 545 (Mich. App. 1995)). Therefore, fraud in the inducement is  
21 extraneous to the contract. *Id.*

22 In this case, Plaintiff's claim for negligent misrepresentation alleges that Defendant made  
23 false statements that induced Plaintiff to enter into the contract. Therefore, the duty allegedly  
24 breached under Plaintiff's negligent misrepresentation claim is independent of any duty that is  
25 imposed by the contract. For these reasons, the court finds that Plaintiff's cause of action for  
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1 negligent misrepresentation is not barred by the economic loss doctrine.

## 2 **B. Fraudulent Misrepresentation**

3 Plaintiff's third cause of action alleges fraudulent misrepresentation. Specifically, Plaintiff  
4 alleges that Defendant falsely stated that the "CVT's were tested for defects and determined not to  
5 be defective." (Compl. ¶ 26.) Plaintiff alleges that these false statements were made in order to  
6 induce it to enter into the contract. Defendant's motion to dismiss seeks to dismiss this cause of  
7 action for failing to plead fraud with sufficient particularity. Plaintiff, in opposition to the motion,  
8 states, without argument, that the complaint "more than satisfies Plaintiff's requirements for a  
9 Claim for either negligent or intentional misrepresentation." (Pl.'s Opp'n to Mot. to Dismiss (# 11)  
10 at 7.)

11 Rule 9(b) of the Federal Rules of Civil Procedure states, "[i]n all averments of fraud or  
12 mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R.  
13 Civ. P. 9(b). A complaint asserting fraud must "detail with particularity the time, place, and  
14 manner of each act of fraud, plus the role of each defendant in each scheme." *Lancaster Cmty.*  
15 *Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). The complaint must also  
16 "set forth an explanation as to why the statement or omission complained of was false or  
17 misleading." *In re Glenfed, Inc. Sec.*, 42 F.3d 1541, 1548 (9th Cir. 1994)

18 The alleged fraudulent statement at issue in this case is that the "CVT's were tested for  
19 defects and determined not to be defective." (Compl. ¶ 26.) According to the complaint,  
20 unspecified Wong Employees allegedly made statements to IGT<sup>2</sup> employees who then disclosed to  
21 Plaintiff that the products were not defective. *Id.* These misrepresentations were allegedly made  
22 from April 17, 2001, through the present. *Id.*

23 The court finds that Plaintiff's allegations of fraudulent misrepresentation fail to meet the  
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25 <sup>2</sup>IGT is a manufacturer of gaming devices. (Compl. ¶ 4.) The gaming devices manufactured by IGT  
26 use CVTs that contain the "boards" manufactured by Defendant. *Id.* ¶¶ 6-8.

1 pleading requirements of Rule 9(b). *See* Fed. R. Civ. P. 9(b). The complaint fails to specify any  
2 specific employee of Defendant who allegedly made the false statement. Furthermore, the  
3 complaint doesn't specify the time or place such statements were allegedly made. The complaint  
4 also fails to set forth an explanation as to why the statement was false or misleading. Instead,  
5 Plaintiff merely concludes that Defendant's "representations were false." (Compl. ¶ 27.)

6 However, "[r]ather than dismissing a case under Rule 9(b), it is preferable that the district  
7 court grant plaintiff leave to amend the complaint even if no request to amend was made, unless it  
8 determined that the pleading could not possibly be cured by the allegation of other facts." *Fidelity*  
9 *Mortgage Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 576 (W.D. Wash. 2003) (citations omitted);  
10 *Tousa Homes Inc. v. Phillips*, 363 F.Supp.2d 1274, 1279 (D.Nev. 2005). Therefore, the court will  
11 give Plaintiff thirty (30) days from the date of this order to amend its Complaint. The failure to file  
12 an amended complaint within thirty days will result in the dismissal of Plaintiff's claim for  
13 fraudulent misrepresentation.

14 IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss or, in the Alternative,  
15 Motion for a more Definite Statement (# 2) is hereby GRANTED in part and DENIED in part.  
16 Plaintiff's Second (negligence) and Fifth (strict liability) claims for relief are hereby DISMISSED.  
17 Plaintiff shall have thirty (30) days from the date of this order to file an amended complaint to  
18 comply with Rule 9(b) of the Federal Rules of Civil Procedure.

19 IT IS SO ORDERED.

20 DATED this 14<sup>th</sup> day of September, 2006.



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23 LARRY R. HICKS  
24 UNITED STATES DISTRICT JUDGE  
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